only the vertical spacing between Stop-Look-Go that does not conform to the indication given in the scheduled diagram. But this alleged error is a permitted variation under regulation 4; "dimensions of the signs" therein referred to means the dimensions shewn on the scheduled diagram. I am unable to accept the view that the regulations compel the authority to increase the allover size of the notice board in order to insert the translations. That would be giving the local authorities concerned so great a latitude that the general standard indicated in regulation 3 could be widely departed from and the result would be a lack of uniformity in general outline and confusing to drivers. On my view of the regulations and the evidence all that is wrong here is that the notice board portion of this sign is short of the standard length of 30 inches by 3/4 of an inch. Such an error should not, in my opinion, be considered strong enough evidence to rebut the presumption that the sign was lawfully made and lawfully placed on the road and I accordingly set aside the order of acquittal and direct that the accused be retried.

Appeal allowed.
Retrial ordered.

RAMASAMY vs. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Horne, J.) April 17, 1941]

Criminal Procedure Code (Cap. 6), sections 66 to 71, 73, 75; section 421 — Bond for good behaviour — Procedure not in accordance with provisions of Criminal Procedure Code — Whether omission to comply with provisions of section 71 an irregularity or an illegality — Test as to what is an irregularity and what is an illegality — Omission to follow correct procedure on requirement to show cause under section 69 an illegality — Evidence once given by defendant on affirmation cannot be withdrawn but entitles prosecution to cross-examine — Admissibility of evidence may depend on section under which proceedings are instituted.

The appellant on the 15th January, 1941, was charged with five others with an assault upon another person. They were acquitted and discharged. The Magistrate then made an order calling upon four of them including the appellant to shew cause why they should not be ordered to execute a bond for a sum of $100 each with two sureties for a period of six months. The Officer in Charge of the Police District was ordered to investigate the case.

Subsequently a summons was issued under section 67 of the Criminal Procedure Code (Cap. 6). The summons did not contain the substance of the information on which it was issued as required by section 71 of the Code.

On the 6th March, 1941; three persons were before the Court on this summons. Two were discharged but the appellant was called upon orally to shew cause under section 69 (c) of the Code. No fresh summons was issued and no formal amendment was made.

The appellant gave evidence and had not finished when the case was adjourned.

When the case was resumed the Advocate appearing on behalf of the appellant submitted that since the summons had been issued under section 67 an order under section 69 (c) could not be made thereon.

The Magistrate ruled against this submission whereupon the Advocate stated he did not propose to proceed with the defence and that he withdrew the evidence given by the appellant.

The Magistrate then ordered the appellant under section 69 of the Code to execute a bond.

The appellant appealed.

Held (i) That the Magistrate has no power to order a person who had been acquitted to shew cause under section 67.

(ii) That the summons issued under section 71 of the Code was fresh foundation for the proceedings.

(iii) That the omission to state the substance of the information on the summons was an irregularity.

(iv) That the calling upon the appellant orally to shew cause under section 69 of the Code was an illegality. The appellant should have been discharged under section 75 of the Code and a fresh summons issued.

(v) That the withdrawal of the evidence of the appellant was unwarranted.

This was an appeal from a conviction of the Magistrate, Port Dickson.

On the 15th January, 1941, appellant and five others were summoned to answer a charge of assault. All were acquitted but the Magistrate, immediately upon such acquittal, made the following Order:—

"It now appears to me. Raja Suleiman bin Raja Mohamed. Magistrate, Port Dickson, that:

1. Govindarajoo,
2. Ramasamy,
3. Kuppusamy,
4. Gopalan, and
5. S. Sinnasamy

are likely to commit a breach of the peace or to do any wrongful act that may probably occasion a breach of the peace.

You the said Govindarajoo, Ramasamy, Kuppusamy, Gopalan and S. Simasamy are hereby called upon to show cause why you should not be ordered to execute a bond for a sum of $100 each with two sureties each for a period of six months.

I direct the Officer in Charge of Police District, Port Dickson, to investigate into this case.

(Sgd.) Raja Suleiman,
15-1-41."

Upon the directions of the Magistrate the Police then made further enquiries and afterwards issued a summons against the appellant and the other four persons concerned containing the following "charge":

"You are hereby required to show cause why you should not be bound over in the sum of $100 with two sureties to keep the peace for a period of six months; Section 67, Chapter 6, Revised Edition."

The summons could not be served on the appellant and the Magistrate, purporting to act under section 47 of the Criminal Procedure Code (Cap. 6), then issued a warrant for his arrest. On this warrant the appellant was arrested and brought before the Court. Evidence was heard on the basis that the proceedings constituted an enquiry under sections 67, 70 and 73 of the Criminal Procedure Code i.e., with a view to ascertaining whether appellant should be ordered to execute a bond "for keeping the peace."

At the close of the evidence called in support of the application the other persons who had been summoned were "acquitted and discharged" but the appellant was orally called upon to shew cause, under section 69 of the Criminal Procedure Code, why he should not execute a bond "for his good behaviour." This action was based on evidence given to the effect that appellant was a notorious gambler and was constantly involved in breaches of the peace, and was therefore alleged to be such a "notorious bad liver" as is referred to in section 69 (*e*) of the Criminal Procedure Code. The appellant was affirmed and gave evidence-in-chief in his defence and the Court then adjourned. On the resumption of the Court counsel for the appellant objected that where a person had been directed to show cause why he should not be bound over "to keep the peace" no order could be made binding him over "to be of good behaviour" but this objection was overruled on the ground that the Magistrate had power to amend any charge. The "charge" was not, however, formally amended. Counsel for appellant then informed the Court that he did not propose to proceed with the defence and wished to "withdraw" the evidence already given by the appellant. Thereupon the Magistrate made an order that the appellant do execute a bond for $100 to be of good behaviour for a period of six months with two sureties. The appellant appealed against this order.

Cases referred to:—

(1) *K. Ranga Reddi v. King Emperor* 43 Mad. 450.

(2) *Mohamed Kaus v. Rex* (1934) 3 M.L.J. 179.

(3) *Driver v. Queen-Empress* 25 Cal. 798.

C. M. P. Pillai for appellant.

J. F. Draper, Deputy Public Prosecutor, for Public Prosecutor.

Horne, J.—The appellant Ramasamy was ordered under section 69 of the Criminal Procedure Code to execute a bond with two sureties to be of good behaviour for six months and in default of so doing was sentenced to three months' rigorous imprisonment.

He appeals on the grounds:—

(1) that the order is against the weight of evidence;

(2) that the appellant was not resident within the jurisdiction of the Magistrate;

(3) that the enquiry having begun under section 67 of the Criminal Procedure Code the Magistrate ought not to have made an order under section 69 (*e*).

With regard to the second ground of appeal it is extremely doubtful whether the appellant was "a person residing or being within the local limits of the jurisdiction of the Magistrate" at the time the Magistrate made his "order" on 15th January. The appeal could I think succeed on this ground, but as the other grounds raise important questions I think it necessary to deal with them.

The record discloses a somewhat muddled procedure. It appears that on the 15th January, 1941, six Tamils were charged before the Magistrate, Port Dickson, with an assault upon another Tamil and were acquitted and discharged. Thereupon the Magistrate made the following order:—

"ORDER.

It now appears to me, Raja Suleiman bin Raja Mohamed, Magistrate, Port Dickson, that:

1. Govindarajoo,
2. Ramasamy,
3. Kuppusamy,
4. Gopalan, and
5. S. Sinnasamy

are likely to commit a breach of the peace or to do any wrongful act that may probably occasion a breach of the peace.

You the said Govindarajoo, Ramasamy, Kuppusamy, Gopalan and S. Sinnasamy are hereby called upon to show cause why you should not be ordered to execute a bond for a sum of $100 each with two sureties each for a period of six months.

I direct the Officer in Charge of Police District, Port Dickson, to investigate into this case.

(Sgd.) Raja Suleiman,
15-1-41."

There is no power to proceed at the conclusion of a trial against persons who are acquitted and bind them over to keep the peace. Persons convicted can be dealt with under section 66 and complainants (whether the accused is convicted or not) may be bound over to keep the peace under section 66A. Therefore the Magistrate appears to me to be acting without jurisdiction in making an order by which he:—

"hereby called upon (the acquitted persons) to shew cause why they should not be ordered to execute a

bond for a sum of $100 each with two sureties each for a period of six months."

Section 70 lays down that a summons is the appropriate procedure under section 67, 68 or 69. And section 71 provides that the summons "shall contain a brief statement of the substance of the information on which such summons was issued."

Perhaps the evidence at the trial at which the appellant and the others were acquitted disclosed such information; but none of it appears in the summons. The fact that the Magistrate directs the Officer in Charge of Police District to investigate leads to the equally probable conclusion that the evidence at the trial had not disclosed information justifying the issue of a summons under section 67. This conclusion seems to be confirmed by the evidence of the Officer in Charge of Police District given at the enquiry to the effect that acting on the order of the Magistrate he made enquiries and then laid an information and then the summonses were issued and later a warrant for the appellant. The summons is the legal foundation of the subsequent proceedings. A warrant also should contain "a brief statement of the substance of the information" (*see* section 71), but in this case it did not. Therefore at the time the enquiry began the appellant had not been informed either by the summons or warrant of the substance of the information.

Section 71 is mandatory in its terms and in my opinion a summons or warrant that omits the substance of the information on which it is based places the person called upon to shew cause in the same position so far as his ability to defend himself is concerned as if he had appeared or had been brought before the Court without any summons or warrant. He can, however, apply for the summons to be amended by the insertion of the necessary facts and for an adjournment so as to meet them. The omission is an irregularity and a very grave one in view of the large amount of hearsay evidence led by the ostensible informant the Officer in Charge of Police District, none of which has any apparent connection with the offence which the appellant had been tried and acquitted. My reasons for saying this omission is an irregularity and not an illegality is that this "substance of the information" is analogous to a charge of an offence and the omission to frame a charge does not invalidate the proceedings unless it occasions a failure of justice (section 421, Criminal Procedure Code).

Even in those Indian cases in which such an omission is called an illegality it is dealt with in the same manner as an omission to frame a charge [*K. Ranga Reddi v. King-Emperor*[1]]. In the Straits Settlements the failure to make an order under section 76 of the Straits Settlements Criminal Procedure Code was held to be an illegality [*Mohamed Kaus v. Rex*[2]]. In the Federated Malay States there are conflicting decisions but in my opinion the real question is whether the defect has occasioned an injustice. By itself I do not think it has, but there are other matters also to be considered.

Only three of the original five persons were before the Court at the enquiry and the Magistrate coming to the conclusion that two of them ought not to be bound over discharged them on 6th March, 1941. He therefore does not appear to have had substantial grounds for calling on them to shew cause on 15th January and he appears to decide that the information furnished by the Police upon his instructions was either not worthy of credence or shewed no ground for the issue of a summons. It can hardly be said that a breach of the peace was imminent on the 15th January when proceedings end in this way.

The Magistrate made no order against the appellant, but apparently detained him in Court and called upon him orally "to shew cause under section 69 (*e*) of the Criminal Procedure Code for a sum of $100 with two sureties for a period not exceeding six months." No fresh summons was issued. The original summons was not amended.

Under section 75 if the Magistrate is not going to make an order in accordance with or within the terms of the summons he should release or discharge the person concerned. There is no direct provision for acting as the Magistrate acted: calling on the person orally to shew cause why a different order should be made upon the evidence already heard.

The learned Deputy Public Prosecutor seeks to get over the difficulty by recourse to sub-section (iii) of section 73. The sub-section provides that an enquiry shall be made as nearly as may be practicable in the manner prescribed for conducting summary trials .....except that no charge shall be made. Accordingly it is submitted that the Magistrate could amend the summons in the same way as a charge is amended under section 173 (*h*). The application of section 173 (*h*) brings in sections 157 to 160 and section 162 and, as far as the record goes, it is never explained by the Magistrate that it is proposed to make the order on the basis of the evidence already heard and no opportunity is offered for the recall and re-examination of witnesses already heard. Had everything been beyond criticism up to that stage it

might be possible to treat the summons as having been amended in like manner to the amendment of a charge, but the substance of the information which is supposed to be in the summons and is analogous to a charge is entirely omitted.

The proper course at this stage was to discharge or release the appellant and issue a fresh summons, or a warrant if grounds for such existed, and adjourn so as to give the appellant time to meet the case against him. An adjournment was at that stage refused and the appellant gave evidence and began to recite his life story but the Court adjourned at the usual hour and the story remains unfinished, for on the resumption a week later, the appellant's Advocate submitted that the summons having been for an order to shew cause why the appellant should not be bound over to keep the peace, an order to execute a bond for good behaviour could not be made thereon.

The submission of the Advocate while a good one under the Indian Code may not always be so under the Federated Malay States Code [see *Driver v. Queen-Empress*(3) and the later amendment to section 117 of the Indian Criminal Procedure Code]. Nevertheless if a person is called upon to shew cause why he should not be bound over to keep the peace and the evidence heard at the enquiry shews no ground for that order but shews that there is ground *prima facie* for an order binding the party called upon to be of good behaviour instead, then the error has possibly been occasioned in the issue of the summons; and if the substance of the information set out in the summons would support an order binding the party called upon to be of good behaviour then, without altering the substance of the information, it is possible to amend the summons. But as already pointed out there never was a sufficient summons in this case. There was nothing that could properly be amended; and in purporting to alter the enquiry to one under section 69 the Magistrate was acting without jurisdiction. If care is taken in issuing a summons a real case for amendment can hardly ever arise.

After a further adjournment the Magistrate ruled against the Advocate's submission, whereupon the Advocate stated he did not propose to proceed with the defence and wished to withdraw the statement made by the appellant.

As the procedure is to be analogous to a summary trial, then, in my opinion, the Magistrate was not bound to accede to the request of the appellant's Advocate. The appellant had been sworn or affirmed as a witness, and the informant had the right to cross-examine him.

These proceedings have been illegally commenced but later there is a new foundation in the summons issued; there is the dangerous irregularity relating to the omission from the summons of the substance of the information; there is illegality in orally calling on the appellant to shew cause under section 69 (*e*) at the conclusion of the hearing of the summons under section 67; there is the unwarranted withdrawal of the appellant; and finally a large amount of the evidence was not admissible in an enquiry held ostensibly under section 67, an error which is not cured by calling the enquiry one under section 69.

I am therefore of opinion that the appeal should be allowed and the order of the Magistrate should be set aside and an order under section 75 should be recorded stating that it is not proved that it is necessary for keeping the peace that the appellant should execute a bond and that the appellant should be discharged.

Appeal allowed and appellant discharged.

JOHORE REPORT.

ONG KAH LOCK vs. HEE YONG FOH.

[Orig. Civil Juris. (Manning, J.) Sept. 27, 1941]

Practice—Accounts and Enquiries—Order for reference to Registrar—Further consideration of action—No provision in Order—Liberty to apply.

In an order directing certain accounts and enquiries to be taken by the Registrar the usual provision for the restoration or further consideration of the action had been accidentally omitted. On application being made for judgment upon the Registrar's Certificate, objection was taken that the Court had no power to repair the omission and therefore no jurisdiction to enter judgment.

Held, that where an Order of the Court is clearly not of a final character it carries with it liberty to apply, although these words do not appear in the Order.

Cases referred to:—

(1) *In re St. Nazaire Company* 12 Ch. D. 88.

(2) *Penrice v. Williams* (1883), 23 Ch. D. 353, applied.

FURTHER CONSIDERATION OF ACTION.

Johannes for plaintiff.

Laycock for defendant.